

SECOND APPEAL NO. 103 OF 2004

1. Jose Lorena, businessman,
2. Maria Santana de Souza
e Lorena, d/o late Miguel
Caetano D'Souza, both
r/o Santismo, Taliegao,
Ilhas, Goa. ... Appellants

Versus

1. Miguel D'Souza,
2. Joaquim D'Souza,
3. Menino D'Souza, and
4. Minguel Arcanjo D'Souza,
all r/o Santismo Vaddo,
Taleigao, Goa. ... Respondents.

Mr. M. B. Da Costa, Senior Advocate with Mr. J. A. Lobo, advocate for the appellants.

Mr. S. G. Dessai, Senior Advocate with Mr. P. A. Kholkar, advocate for the respondents.

CORAM : B. H. MARLAPALLE, J.

DATE : 16th September, 2004.

ORAL ORDER

Heard Mr. D'Costa, learned Senior Counsel with Mr. J. A. Lobo, advocate for the appellants and Mr. S. G. Dessai, learned Senior Counsel with Mr. Kholkar, advocate for the respondents. This Second Appeal arises from the decree of eviction passed by the learned Civil Judge, Senior Division at Panaji in Regular Civil Suit No.377/2000 (Old Spl. Civil Suit No.198/95) and duly confirmed by the learned Second Additional District Judge at Panaji in Regular Civil Appeal No.213/2003 and it supports the general belief that

one of the causes for increasing litigation is the greed for money, power and property which, in fact, at times converts the blood relations into dead enemies.

2. The present respondents moved Special Civil Suit No.198/95 contending that the suit house bearing no. 124 new (148 old), was belonging to the mother-in-law of plaintiff no.1 and she was the mundkar of the said house located at Bondiem Bhat, Taleigao and consisting of four rooms and a verandah. It was partitioned by the mundkar herself during her lifetime amongst two of her daughters, namely the wife of plaintiff no.1 and Mrs. Maria Monteiro. Both of them were given 1/2 share. The mother-in-law expired on 4th May, 1976 after doing this partition and thereafter the wife of plaintiff no.1 Ruzai Monteiro also died. Sometime in 1981-1982, defendant no.2, who is the daughter of the plaintiff no.1 and sister of plaintiff nos.2 to 4, approached her parents and sought permission to occupy the suit house as her husband, defendant no.1, had left for Saudi Arabia and her in-laws were harassing her. She had promised to vacate the suit house on return of defendant no.1. On this request made by the defendant no.2 she was allowed to occupy the suit house. Defendant no.1 returned to Goa in 1985 and started residing in the suit house and thereafter he purchased a plot of land at about a distance of 1 1/2 kms. from the suit house and constructed a three-storied building as a hotel-cum-residence and shifted all their belongings. The

plaintiff no.1 after the demise of his wife approached the defendants to vacate the suit house, but the defendants did not pay any heed and, on the other hand, kept the house locked. The legal notice issued by the plaintiff had no response and, therefore, the plaintiffs moved the suit for eviction and also for mesne profits at the rate of Rs.400/- per month, from the date of refusal.

3. The defendants appeared and filed written statement and challenged the title of the plaintiff no.1, wife as a mundkar. They contended that Mariquinha Ribeiro, the mother-in-law of plaintiff no.1 was staying all alone in the suit house and the plaintiff no.1 as well as his wife did not look after her. About seven to eight months prior to her death she had approached the defendants to come and stay in the suit house, more so because her second daughter was also in Mumbai. The defendant shifted to the suit house and the original mundkar had agreed to give 1/2 portion of the entire house property to the defendants, but before she could execute the gift deed, she died. The defendants thereafter continued to reside in the suit house and under these circumstances the plaintiffs had no title valid in law to seek the eviction of the defendants.

4. The trial Court held that Ruzai Monteiro was in possession and occupation of the suit house, the plaintiffs were entitled to recover the possession of the suit house

from the defendants on appreciation of the evidence that was placed before it and by its decree dated 26th September, 2003, had ordered the defendants to vacate the suit house and hand over vacant and peaceful possession of the same to the plaintiffs with mesne profits at Rs.400/- per month from 16th June, 1993, till the vacant possession was delivered to the plaintiffs. In appeal, the lower Appellate Court confirmed the decree, by concurring with the findings recorded by the trial Court.

5. Mr. D'Costa, learned Senior Counsel invited my attention to the substantial questions of law framed in para 3 of the Appeal Memo and more particularly the points at (i) and (ii). By referring to the provisions of Section 3 of the Goa Mundkar (Protection From Eviction) Act, 1975, it was submitted that the rights of a mundkar in his dwelling house shall be heritable and shall not be transferable. At the same time, the rights of a mundkar cannot be transferred to a married daughter in view of Section 2(P0 read with Section 2(1) of the said Act. That being the legal position, the wife of plaintiff no.1 could not have been conferred with the rights of mundkar by the Mamlatdar and the said certificate was obtained by playing a fraud. It was further contended that even if in their written statement the defendants had accepted the status of the wife of the plaintiff no.1 as mundkar, it was a concession dehors the provisions of law made by the advocate concerned and, therefore, it was not

binding on the defendants. A number of decisions in this regard have been cited and they are: **Bishunath Tewari & Ors. vs. Mist. Mirchi**, AIR 1955 Pat.66, **Commissioner of Survey, Settlements and Records, A.P., Hyderabad and others vs. Kunsam Saranarayana & Ors.**, AIR 1997 SC 3867, **Uptron India Ltd. vs. Shammi Bhan & Anr.**, (1998)6 SCC 538, **State of Rajasthan & Anr. vs. Mahaveer Oil Industries & Ors.**, (1999)4 SCC 357, **Kulwant Kaur & Ors. vs. Gurdia Singh Mann (Dead) by L.Ts. & Ors.**, (2001)4 SCC 262, **Director of Settlements, A.P. & Ors. vs. M.R. Apparao & Anr.**, (2002)4 SCC 638 and an unreported decision of this Court in Letters Patent Appeal No.19 of 2000 decided on 2nd December, 2003 (Mr. Anthony D'Souza & Anr. vs. Mr. Joaquim D'Costa & Ors.).

6. Mr. Dessai, learned Senior Counsel for the plaintiffs on the other hand, submitted that the substantial questions of law pressed before this Court did not arise for consideration before the courts below as they were not raised and, in any case, the status of the wife of the plaintiff no.1 as successor mundkar to the suit house was never challenged. In addition, such a challenge could not have been raised before the Civil Court and the issue could be decided only by the Mamlatdar's Court.

7. So far as the title of original mundkar, namely Mrs. Mariquinha Ribeiro is concerned, there is no dispute

between the parties. She died on 4th May, 1976. The wife of plaintiff no.1 Ruzai Monteiro was declared mundkar by Order dated 2nd August, 1982 and on the consent given by the bhatkar. The defendant no.2 started occupying the suit house around the same time. There was also no dispute regarding the partition of the original property by Mrs. Ribeiro amongst her two daughters, i.e. Ruzai Monteiro and Maria Monteiro. The suit house in this partition as per the certificate granted to the wife of plaintiff no.1 had gone to her share. A number of documents were brought on record like the electricity bills, tax payment receipts, etc. including the extract in Form XI under Rule 21 of the Mundkar Rules and all these documents were in the name of Mrs. Ruzai Monteiro. The defendant no.1 in his cross-examination before the trial Court admitted that the suit house had electric connection before it was occupied and the defendant no.2 never stepped in the witness box. The documents submitted by D.W.1 at Exh.D.W.1/E/D indicated that it was a bill for an amount Rs.8323/- and it was by way of arrears in the bill payment. It was returned as the house was locked and this was another proof to show that the defendants were keeping the suit house locked after they had constructed a three-storied building as hotel-cum-residence and by inference it was accepted that they were not staying in the said house.

8. It was not open for the trial Court to decide the issue of the status of the wife of plaintiff no.1

vis-a-vis the suit property and such a right was duly recognized way back in August, 1982. On assessment of the evidence both the courts below have concurrently held that the plaintiff no.1 had initially allowed the defendant no.2 to occupy the house in view of the peculiar circumstances she was placed in, in the absence of her husband and subsequently on his return when they constructed a huge building they started occupying part of it for their residential purposes and the suit house was kept locked. The case of the plaintiffs was based on the documentary evidence that was duly accepted by both the courts below.

9. The substantial questions of law framed in this appeal did not arise for consideration and in fact, they do not arise for consideration in this appeal as well. The defendants had no title to the property and they were allowed to occupy the suit house by the parents of the defendants no.2 only to help them and inspite of legal notice having been served on or about 16th June, 1993, they failed to vacate the same. The view taken by both the courts below does not suffer from any errors on any count and, therefore, there is no substantial question of law that falls for consideration in this Second Appeal. The same is hereby dismissed in limine.

B. H. MARLAPALLE, J.